*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: September 18, 1996

TO : William C. Schaub, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Valley Electrical Contractors, Inc.
Case 7-CA-38616

524-0133-7500
524-0183-6782
524-5012-7000
524-6708-6200

This case is being submitted for advice as to whether the Employer unlawfully refused to consider for hire Union applicants in violation of Section 8(a)(3).

## FACTS

Valley Electrical Contractors (the Employer) is an electrical contractor located in Midland, Michigan. It employs about 50 electrical workers. Valley services several clients, but its primary customers are Dow Chemical Company and Dow Corning Company, whose plants are located in Midland, Michigan. Valley is owned by three individuals, James Johnson, Michael Parsons and Gerald Whittington. Johnson owns 51 percent of the corporation and is a corporate officer but appears to have no role in its day-to-day operation.

Valley regularly maintains a sign on its door that it accepts no applications. The sign was removed on July 30, 1995 to "test the labor market." Valley contends it did so to evaluate the labor pool because it was in the process of bidding on a Dow Chemical project which had the potential to increase Valley's need for additional workers. The sign remained down until September 8, 1995, and that during that time, Valley obtained only five applicants.

During January and February, 1996 Valley subcontracted 8 electricians from Davis, 5 electricians from Pyramid, and 7 laborers from Three Rivers to perform and complete the work on the heat tract project.

On September 6, 1995, Union organizer Mark Bauer sent a letter to Valley stating that Valley employees Michael Eddy, Chris Hawkins and James St. Denis were organizers for the IBEW. On September 9, 1995, Valley reposted the sign on its door stating that it was not accepting applications for employment.

Sometime in September, Valley was awarded the Dow Chemical work on which it had bid. At the time Valley received the award, Dow indicated that Valley might subsequently be asked to perform additional work on an ancillary part of the project known as the "heat trace" job, which would require about 20 additional workers.

In October 1995, James Johnson, the majority owner of Valley and president of J.E. Johnson, a mechanical contractor next door to the Valley shop, threatened J.E. Johnson employees that employees who seek union representation will be discharged. This was alleged as an 8(a)(1) threat in Case No. 7-CA-37745 against that company and was later settled. The settlement agreement contains a reservations clause in which the General Counsel reserved the right to use the evidence in the settled case for any relevant purpose in the litigation of, inter alia, any other case.

In November, 1995, Dow notified Valley that it should undertake the heat trace job in December, with the understanding that the project should be completed in approximately 3 months. Valley decided to subcontract other electrical contractors to perform most of the work on the heat trace project instead of hiring directly. Accordingly, Valley contacted Davis Electric, Pyramid Control and Three Rivers Construction to provide contract labor.

On December 29, 1995, Union organizers Mark Bauer and Robert Calkins went to the Valley offices to apply for work. Bauer was wearing a union jacket at the time. The sign was posted on the door stating "We are not accepting applications or resumes at this time." They spoke to a secretary who told them that Valley was not accepting applications or resumes.

On January 4, 1996, Bauer and Calkins returned to the Valley office. The sign was still posted and they were

told again that Valley was not accepting applications or resumes. On January 15, 1996, Bauer, Calkins and Tammy De Baker, an unemployed member of the Local, went to the Valley office. They were told Valley was not taking applications. On January 31, 1996, Bauer and Calkins returned to Valley. They were again told by the secretary that Valley was not taking applications. Bauer stated they had heard that Valley did some hiring last week. (Bauer had been told by some Davis Electric employees that a number of Davis employees had been loaned out to Valley see below). The secretary said that she did not know of anyone being hired.

In January 1996 the Employer hired three of the five persons who had applied during the July 30 to September 8, 1995 period: Jamie Mose, a laborer, was well known to the Valley electrical estimator and was engaged to the estimator's granddaughter; Daniel Jurn was strongly recommended for hire by Valley foreman Charlie Holm; and Dean Mayer was a former employee of Valley and his brother was a current employee.

During January and February 1996, Valley subcontracted 8 electricians from Davis, 5 electricians from Pyramid, and 7 laborers from three Rivers to perform and complete the work on the heat tract. These employees continued to be paid by their own employers. They were supervised by Valley supervisors.

The Employer also hired four individuals who had not applied in the summer of 1995: In January 1996, James Hess was hired as a laborer. He returned to school after the summer. In early February 1996, Nathaniel Owens, son of Valley employee Rick Owens, was hired as an apprentice. In June 1996, Gerald Travis contracted Valley about employment. He was hired and started work in July 1996. Travis had previously worked for Valley until July 1995. Cory Mavis was hired and started work for Valley in June 1996. Mavis had also previously worked for Valley. Franklin Howell worked for Valley until about August 1995. He resigned at that time to work for a union contractor. In about May 1996, Valley part-owner Gerald Whittington told Howell that if Howell ever desired to return to Valley, they could find work for him. In early March 1996, David Oswald contacted Valley inquiring about work. Whittington, a friend of Oswald, told him that he would

check into the matter. A week later, Whittington called Oswald and told him that they would have some work coming up in about a month and a half. Oswald did not contact them again.

The Employer asserts that given it decided to subcontract other electrical contractors to perform most, if not all, of the heat trace work as opposed to attempting to locate, train, test and acclimate new employees to the project, because of the it lacked a ready labor supply and was working under a short time frame. Further, with respect to its hiring 3 out of the 5 applicants who had applied during the summer, Valley asserts that it "was only interested in hiring those individuals whom it knew possessed a strong work ethic and who had been previously trained and were fully qualified to immediately commence working on Dow Chemical projects." Thus, because it "did not have any verifiable evidence as to whether the remaining 2 applicants for employment were hardworking or previously trained and tested for work on Dow Chemical projects, Valley did not consider them for hire. The Employer asserts that it did not hire any employees employees other than those discussed above.[1]

**ACTION**

Complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(3) by unlawfully refusing to consider for hire applicants solely because they were Union members.

A prima facie case of an unlawful refusal to hire or consider for hire an applicant is proven where, (1) an individual files an employment application, (2) the employer refuses to consider for hire or hire the applicant, (3) the applicant is or might be expected to be a union supporter, (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against the union activity, and (6) the employer refuses to consider or hire the applicant because of such animus.[2]

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[1] The Region did not ask the Employer about the 4 individuals hired who had not applied in the summer of 1995.

As to the requirement of animus, animus can be established by direct evidence of contemporaneous or past unlawful conduct, hiring disproportionately few union members where many union members applied,[3] utilizing procedures which disfavor union applicants,[4] departing from standard hiring policy,[5] or by "the record as a whole."[6] Once the proscribed intent is established, the causal element is inferred. The employer can rebut a prima facie case by establishing that the applicant would not have been hired even absent the discriminatory motive.[7]

In D.S.E. Concrete Forms,[8] the Board affirmed the ALJ's conclusion that the employer violated Section 8(a)(3) and (1) when it discriminatorily refused to consider for hire employees whom it suspected of union sympathies. In doing

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[2] KRI Constructors, 290 NLRB 802, 811 (1988) and cases cited therein; Lewis Mechanical Works, 285 NLRB 514, 516 (1987); Ultrasystems Western Constructors, 310 NLRB 545, 555 (1993), enf'd in part 18 F.3d 251 (4th Cir. 1994).

[3] Fluor Daniel, Inc., 304 NLRB 970, 971 n.10 (1991) (Fluor Daniel I), and cases cited therein.

[4] Ultrasystems Western Constructors, 310 NLRB at 555 (policy of screening out union applicants evidences animus); KRI Constructors, 290 NLRB at 811 (policy of hiring more expensive, out-of-state applicants is against self-interest and evidences animus).

[5] Fluor Daniel, Inc., 311 NLRB 498, 499 (1993) (Fluor Daniel II) (employer gave union applicants more difficult employment examination); Ultrasystems, 310 NLRB at 555 (employer delayed processing of union supporters' applications for unusual amount of time).

[6] Fluor Daniel I, 304 NLRB at 970.

[7] KRI Constructors, 290 NLRB at 811, citing NLRB v. Transportation Management Corp., 462 U.S. 393, 399-403 (1983).

[8] 303 NLRB 890 (1991).

so, the Board considered the effect of the employer's hiring practices, under which the employer gave first preference to existing employees at its other jobsites; second preference to employees available for transfer from another non-union employer with whom it had a management contract; and third preference to referrals from its existing employees. The Board reasoned that "the practical effect of the first three job criteria was to preclude employment of union members at the jobsite."[9] The ALJ concluded that these hiring criteria reinforced the General Counsel's contention that the applications were not considered because the applicants were union members and that the employer was "pursuing a pattern or practice by which it systematically declined to consider any union members for employment."[10] In D.S.E. Concrete, the ALJ also found independent evidence of animus based on a supervisor's repeated anti-union statements to union applicants and the employer's later rejection of applications proffered by the union.[11]

Similarly, in Ultrasystems Western Constructors,[12] the Board held that the employer, which harbored anti-union animus, violated Section 8(a)(3) by maintaining a hiring policy which screened job applicants to uncover suspected union sympathizers, and by refusing to consider applicants for employment based on its conclusion that they were union sympathizers. The Board affirmed without comment the ALJ's conclusion that, although the practice of hiring employees who follow supervisors and managers from job to job was not "unlawful in itself, it is evidence of an affirmative

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[9] Id. at 890 n.2.

[10] Id. at 898.

[11] The ALJ's conclusions which the Board adopted do not specifically hold that the employer's hiring practices violated Section 8(a)(3). The General Counsel apparently had not argued that the hiring practices were themselves violative.

[12] Ultrasystems Western Constructors, 310 NLRB 545, 555.

preference for individuals known to be both competent and to be free of any union connection."[13]

Based on the above, we conclude that the Employer unlawfully refused to consider for hire Union applicants. Our conclusion is based on the following considerations:

First, as in D.S.E. Concrete, there is independent evidence of animus in the Section 8(a)(1) threat by James Johnson, majority owner of Valley and president of J.E. Johnson, a mechanical contractor next door to the Valley shop. Johnson threatened employees of J.E. Johnson that employees who seek union representation will be discharged. Although the threat was not made directly to Valley employees, Johnson's majority ownership in Valley provides some basis for establishing Valley's anti-union animus.[14]

Second, it is clear that during the time the Employer refused to accept applications from the Union applicants, it was in the process of hiring. In this regard, we note that in July 1995, the Employer knew that it would probably need to hire employees because it had bid on a Dow Chemical project. Thus, on July 30, 1995, the Employer removed a sign from the door which stated that it was not accepting applications, and subsequently received applications from 5 prospective employees. The sign stayed down until the Union informed the Employer on September 6 that three of the Employer's employees were organizers for the Union. Three days later, on September 9, Valley reposted the sign stating that it was **not** accepting applications for employment. When Union applicants, one of whom was wearing a Union jacket, attempted to apply for employment on December 29, January 4, 15 and 31, the Employer refused to accept their applications. Notwithstanding the sign and the Employer's refusal to accept applications from the Union applicants, in January, the Employer hired three of

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[13] 310 NLRB at 554.

[14] Although this case was settled, the settlement agreement contains a reservations clause in which the General Counsel reserved the right to use the evidence in the settled case for any relevant purpose in the litigation of, inter alia, any other case.

the five applicants who had applied during the July 30 to September 1995 period. Further, the Employer obtained at least 10 employees from three other nonunion employers. And, the Employer hired an additional four employees who had not applied in the summer of 1995: Hess was hired in January 1996, Owens was hired in February 1996, Mavis was hired in June 1996, and Travis was hired in July 1996.

Third, the evidence indicates that Valley only hired individuals whom it knew were not affiliated with the Union. In addition to the 20 employees it subcontracted from non union employers, six of the 7 direct hires were either former employees, relatives of or recommended by the foreman or other employees of Valley.

And finally, the timing of Valley's reposting of the "not accepting applications" sign is suspect. Despite the fact that the Employer knew that it would need additional employees, the Employer reposted the sign three days after the Union informed it that three of its employees were Union organizers.

Based on all the above circumstances, we conclude, in agreement with the Region, that the Employer refused to consider the Union applicants for discriminatory reasons. Further, the Employer has offered insufficient evidence to warrant a different conclusion. As discussed above, the evidence contradicts the Employer's assertion that it only accepted applications when the sign was down during the summer of 1995. Further, the Employer's asserted business justification for subcontracting the heat trace work is only relevant to the issue, not present in this case, of whether the decision to subcontract rather than to hire was discriminatorily motivated. The fact that the Employer subcontracted the heat trace work is only evidence that the Employer was in the hiring mode when it refused to accept applications from known Union adherents.

As a remedy for a discriminatory refusal to **consider** Union applicants, the Board orders an employer to "consider them for hire and to provide backpay to those whom it would have hired but for its unlawful conduct.[15]

B.J.K

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[15] H.B. Zachry, 319 NLRB 967, 968 (1995).